Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas	WC Docket No. 06-172
Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	WC Docket No. 07-97

JOINT COMMENTS OF THE MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL AND THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

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I. INTRODUCTION

The Massachusetts Office of the Attorney General ("MA AG")[1] and the Massachusetts Department of Telecommunications and Cable ("MDTC")[2] (collectively, the "Joint Commenters") respectfully submit these comments pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on August 20, 2009, in the above-referenced dockets.[3]

In the Public Notice, the Commission requests comment on remands by the United States Court of Appeals for the District of Columbia ("D.C. Circuit") of two Commission orders, the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order*.[4] The D.C. Circuit remanded the *Verizon 6 MSA Forbearance Order* on the "'limited ground' that the

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[1] The MA AG is an officer of the Commonwealth of Massachusetts ("Commonwealth") authorized by common law and by statute to institute proceedings before state and federal courts, tribunals, and commissions that she may deem to be in the public interest. *See* M.G.L. c. 12, §10; *Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E. 2d 1262, 1266 (1977); *Secretary of Administration and Finance v. Attorney General*, 367 Mass. 154, 326 N.E. 2d 334, 338 (1977). The MA AG is further authorized by statute to intervene on behalf of public utility ratepayers in administrative proceedings involving financing, rates, charges, prices or tariffs of any telecommunications company doing business in Massachusetts and subject to the jurisdiction of the MDTC. *See* M.G.L. c. 12, §11E.

[2] The MDTC is the exclusive state regulator of telecommunications and cable services within the Commonwealth. *See* M.G.L. c. 25C, §1. The MDTC regulates telecommunications and cable operators in Massachusetts according to the laws of the Commonwealth and the federal government. The MDTC's mission is to support competition in telecommunications and cable services within the Commonwealth and to protect the public interest by ensuring that customers of these services are treated consistently with the MDTC's regulations. *See* MDTC Mission Statement, available at www.mass.gov/dtc.

[3] *See In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, and *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Public Notice, DA 09-1835 (rel. Aug. 20, 2009) ("Public Notice").

[4] *See* Public Notice at 1; *see also Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order, FCC 07-212, ¶ 1 (rel. Dec. 5, 2007) ("*Verizon 6 MSA Forbearance Order*"), *remanded, Verizon Tel. Cos. v. FCC*, No. 08-1012, slip. op. (D.C. Circuit June 19, 2009) ("*Verizon v. FCC*"); *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, FCC 08-174, ¶ 1 (rel. July 25, 2008) ("*Qwest 4 MSA Forbearance Order*"), *remanded, Qwest Corporation v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009) ("*Qwest Corporation v. FCC*").

Commission had not explained its departure from precedent," and directed the Commission to "either consider whether competition might be established by some evidence other than simply whether the [incumbent local exchange carrier ("ILEC")] has met a particular market share benchmark, or justify its departure from its precedent" set forth in the *Omaha Order* and the *Anchorage Order*.[5] The D.C. Circuit remanded the *Qwest 4 MSA Forbearance Order* upon the Commission's request.[6] According to the Commission, the issues in the two orders "substantially overlap" and both utilize "the same general analytical approach."[7]

In addition to seeking comment on the D.C. Circuit's statements above, the Commission makes the following inquiries:[8]

- To what extent, if at all, should the Commission depart from its marketplace analysis in forbearance petitions, including the *Omaha Order* and the *Anchorage Order*?
- What evidence, beyond an ILEC's market share for a particular product market, is relevant to whether forbearance from unbundling regulations is warranted?
- How does "the existence of potential competition … affect [the Commission's] section 10 forbearance analysis"?[9]
- What other issues are relevant to the Commission's resolution of the Verizon and Qwest forbearance petitions and what additional factors should the Commission take into account in its analysis?

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5 *Verizon v. FCC*, slip. op. at 3, 19. *See also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160 in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005) (*"Omaha Order*"), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, FCC 06-188 (rel. Jan. 30, 2007) ("*Anchorage Order*"), *appeals dismissed, Covad Commc'n Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing).

6 Public Notice at 1.

7 *Id.* at 1, 3.

8 *Id.* at 3-4.

9 *Id.* at 3, *citing Verizon v. FCC*, slip. op. at 19.

- To what extent should any changes in the marketplace or Commission actions since the time the Commission issued the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order* affect the Commission's decision?

The Joint Commenters address these Commission inquiries, though the focus of these comments is on the D.C. Circuit's remand of the *Verizon 6 MSA Forbearance Order* and the applicability of potential Commission action to those portions of the Boston and Providence MSAs located within Massachusetts.[10] However, because the Commission used the same general analytical approach in the *Verizon 6 MSA Forbearance Order* and the *Qwest 6 MSA Forbearance Order*, certain of the Joint Commenters' arguments could apply equally to both orders.

The first portion of these comments briefly discusses the Commission's forbearance orders and the D.C. Circuit's analysis of the *Verizon 6 MSA Forbearance Order*. The second portion distinguishes the Verizon proceeding from the Commission's prior unbundling obligation forbearance proceedings and discusses why the Commission's standard in the *Verizon 6 MSA Order* was proper. In particular, the Joint Commenters contend: (1) by the time of the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order*, the Commission was cognizant of certain factors which warranted a greater focus on actual rather than potential market share in its analysis; (2) in those MSAs located in Massachusetts, granting forbearance to Verizon would have ensured a duopoly within the residential wireline voice market, effectively

[10] The Boston MSA is located within eastern Massachusetts and extends into the southern portion of New Hampshire, and the Providence MSA extends into southeast Massachusetts. *See* Office of Management and Budget, *Update of Statistical Area Definitions and Guidance on Their Uses*, OMB Bulletin No. 09-01, Appendix at 26 and 46 (Nov. 20, 2008), available at http://www.whitehouse.gov/omb/assets/omb/bulletins/fy2009/09-01.pdf. The Joint Commenters' focus on the Massachusetts portion of the Boston MSA is particularly relevant since Verizon no longer operates as an ILEC in New Hampshire. *See, e.g., In the Matter of the Petition of Verizon New England, Inc., et. al. and Fairpoint Communications, Inc. for Authority to Transfer Assets and Franchise*, Order Approving Settlement Agreement with Conditions, New Hampshire Public Utilities Commission ("NH PUC"), Docket No. DT 07-011, Order No. 24,823 (rel. Feb. 25, 2008). Information and documents relating to NH PUC Docket No. DT 07-011 are available through the NH PUC's website at http://www.puc.nh.gov/Regulatory/Docketbk/2007/07-011.htm and http://www.puc.nh.gov/Telecom/VerizonSaleToFairpoint.htm.

stifling further competition and creating barriers to entry; (3) the wider geographic scope of the order and the specific data available warranted the more stringent forbearance standard of estimating Verizon's actual market share; and (4) actual market share is a more reliable indicator than potential market share for whether a request for forbearance should be granted.

II. BACKGROUND

A. *Omaha Order*

On December 2, 2005, the Commission issued the *Omaha Order* in which it granted to Qwest, operating as an ILEC, forbearance from certain dominant carrier and unbundled network element ("UNE") requirements in portions of Qwest's service territory located in the Omaha MSA.[11] In particular, the Commission granted forbearance to Qwest with regard to application of the Commission's price cap, rate of return, tariffing, discontinuance, and transfer of control regulations applicable to dominant carriers for interstate mass market (residential consumer and small business customers) exchange access services and mass market broadband Internet access services, and with regard to its obligation to provide unbundled loops and dedicated transport pursuant to section 251(c)(3) of the Act.[12] [13]

The Commission's determinations were largely guided by data submitted about the two primary, non-wireless, facilities-based telecommunications providers operating within the particular service territory: (1) Qwest, the ILEC; and (2) Cox Communications, the incumbent cable operator.[14] In addition, the Commission provided a forbearance analysis for Qwest's

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[11] *Omaha Order* at ¶ 2.

[12] 47 U.S.C. § 251(c)(3); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq*. These comments refer to both of these Acts as the Act.

[13] *Omaha Order* at ¶¶ 2, 15, and 22; *see also Verizon 6 MSA Forbearance Order* at ¶ 6.

[14] *Omaha Order* n.46, at 9.

dominant carrier regulations separate from its forbearance analysis for Qwest's UNE obligations to provide loops and transport. The Joint Commenters focus only on the Commission's UNE obligation forbearance analysis.[15]

Within the framework of the statutory forbearance standard, the Commission specified that its unbundling analysis in its *Triennial Review Remand Order* was "instructive" as it related to its UNE obligation forbearance analysis within the MSA.[16] [17] The Commission explained:

> [i]n the *Triennial Review Remand Order*, the Commission declined to order unbundling of network elements to provide service in the mobile wireless services market and long distance services market, due to the evolution of retail competition that has not relied upon UNE access. The Commission did not believe it was appropriate at that time to render similar judgments for local exchange service and exchange access service. Nevertheless, the Commission announced that it might one day be appropriate to conclude, based upon *sufficient facilities-based competition, particularly from cable companies*, that the state of local exchange competition might justify forbearance from UNE obligations.[18]

As a result, the Commission analyzed whether to grant Qwest forbearance from its loop and transport UNE obligations based on whether Qwest faced "sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a)."[19]

The Commission deemed facilities-based competition to be sufficient to grant forbearance to Qwest from the loop and transport element requirements for several reasons.

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[15] As discussed more fully below, it is the Commission's UNE obligation forbearance determinations that are at issue in the D.C. Circuit's remand of the *Verizon 6 MSA Order*. The Joint Commenters' lack of discussion with regard to the Commission's dominant carrier regulation forbearance analysis should not be construed as taking a particular position on that issue.

[16] 47 U.S.C. § 160 (statutory standard for forbearance).

[17] *Omaha Order* at ¶ 63, citing *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290 (2004) ("*Triennial Review Remand Order*"), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[18] *Omaha Order* at ¶ 63 (emphasis added) (citations omitted).

[19] *Id.* at ¶ 61.

Primarily, the Commission specified that the potential competition offered by Cox through its facilities coverage area located within Qwest's service territory in the Omaha MSA constituted sufficient facilities-based competition.[20] According to the Commission:

> [facilities-based] competition [is] sufficient to justify forbearance in wire center service areas where Cox is willing and able within a commercially reasonable time of providing service to [**XX**] percent of the end user locations accessible from that wire center.[21]

The Commission also looked to whether Qwest's competitor had been "*successfully* providing [through extensive facilities] local exchange and exchange access services in [Qwest's Omaha] wire center service areas without relying on Qwest's loops or transport" and indicated that competitive carriers would still be able to rely on other provisions of the Act, namely through sections 251(c) and 271(c), in order "to develop and preserve competitive local markets."[22] In short, the Commission based its decision on determinations of "actual and potential competition" offered by a cable operator, as measured through the use of percentages of "sufficient" facilities-based competition and "successful" provisioning of local exchange and exchange access services within the ILEC MSA territory.[23]

B. *Anchorage Order*

Utilizing "the same analytic framework" it used in the *Omaha Order*, on January 30, 2007, the Commission granted forbearance to ACS of Anchorage, Inc. ("ACS") from its ILEC

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[20] *Id.* at ¶¶ 59, 69; n.156 at 30 (specifying that as used in the order, "an intermodal competitor "covers" a location where it uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the "ILEC's] local service offerings").

[21] *Id.* at ¶ 69. The percentage was redacted from the order because the Commission deemed it to be proprietary and competitively sensitive.

[22] *Id.* at ¶¶ 59, 64, and 69 (emphasis added).

[23] *Id.* at ¶¶ 66 and 69. The Commission further noted that "competition based on UNE loops and transport make up a minor portion of the competition in the Omaha MSA." *Id.* at ¶ 68.

UNE and UNE pricing requirements in portions of its service territory located within the Anchorage MSA.[24] In particular, the Commission granted to ACS forbearance from its section 251(c)(3) obligation to provide unbundled access to loops and transport and their associated prices regulated under section 252(d)(1) of the Act.[25] Just as in the *Omaha Order*, the Commission's determinations were largely guided by data submitted about the two primary, non-wireless facilities-based telecommunications providers operating within the service territory: (1) ACS, the ILEC; and (2) General Communications, Inc. ("GCI"), the incumbent cable operator (and ACS' primary competitor).[26] Further, the Commission analyzed whether to grant forbearance based on the primary competitor's actual and potential ("coverage") market share within the study area.[27]

C. *Verizon 6 MSA Order* and the D.C. Circuit

Several months after the Commission issued the *Omaha Order*, Verizon sought requests for forbearance "comparable" to the relief granted to Qwest in the Omaha MSA, as well as additional forbearance from all *Computer III* obligations.[28] In particular, Verizon sought forbearance "from dominant carrier regulation of its mass market switched access services,

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[24] *Anchorage Order* at ¶¶ 9. The Commission clarified that by "loop and transport elements," it meant "all analog, DS0, DS1 and DS3 loop, certain subloop, and dedicated transport network elements that are subject to section 251(c)(3) unbundling." *Id.* n.70, at 14.

[25] *Id.* at ¶ 20. Unlike Qwest, ACS did not seek the same extent of forbearance extending to, for instance, application of the Commission's dominant carrier regulations. *Id.* n.2, at 2. Further, the Commission indicated that it "may reach different conclusions in other markets regarding forbearance from section 251(c)(3) and section 252(d)(1) obligations where the competitive situation differs from the situation in Anchorage." *Id.* n.28, at 6.

[26] *Id.* at ¶¶ 2 and 46.

[27] *Id.* at ¶¶ 27-38, n.78 at 16, and Statement of Commissioner Deborah Taylor Tate. The Commission first estimated the percentage of residential lines held by both companies and next estimated GCI's coverage capabilities within ACS' wire centers, utilizing in the latter analysis what it labeled the "Coverage Threshold Test." Applying this test, the Commission stated that it was appropriate to grant forbearance relief "only in wire center service areas where a competitor has facilities coverage of at least [**XX**] percent of the end user locations accessible from a wire center." *Id.* at ¶¶ 27-38. As was done in the *Omaha Order*, the percentage was redacted from this order because the Commission deemed it to be proprietary and competitively sensitive

[28] *Verizon 6 MSA Forbearance Order* at ¶ 1.

section 251(c)(3) loop and transport unbundling obligations … and all *Computer III* obligations (*e.g.*, open network architecture and comparably efficient interconnection requirements)" within the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs ("6 MSAs").[29] On December 5, 2007, the Commission issued the *Verizon 6 MSA Forbearance Order* in which it denied all of Verizon's requested relief.[30] Due to the determinations subsequently made by the D.C. Circuit on this order, the Joint Commenters refrain in large part from describing the Commission's analysis except to the extent summarized by the D.C. Circuit and as described below.

Verizon appealed only the Commission's denial of its UNE forbearance requests to the D.C. Circuit.[31] The D.C. Circuit found that the Commission's rejection of Verizon's UNE forbearance requests was arbitrary and capricious, determining that the Commission had departed from its forbearance precedent on unbundling obligations.[32] In particular, the D.C. Circuit found that the Commission had applied "a per se market share test that considered only actual, and not potential, competition in the [residential] marketplace" as opposed to the two-part test applied by the Commission in the *Omaha* and *Anchorage Orders*.[33] Further, according to

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29 *Id.*

30 *Id.*

31 *Verizon v. FCC*, slip. op. at 2-3; *see also* Verizon Brief, *Verizon v. FCC*, n.11 at 14 (specifying that, although it disagreed with the Commission's determinations with regard to its requested forbearance from the dominant carrier regulations and *Computer III* requirements, it did not challenge those denials).

32 *Verizon v. FCC*, slip. op. at 13, 18.

33 *Id.* at 7-8 and 16. The Commission had provided additional analysis with regard to competition in the enterprise and wholesale markets when it made its determinations against Verizon, but the D.C. Circuit found them to be meaningless when compared with the Commission's determinations in the *Omaha* and *Anchorage Orders*:

> In the *Omaha Order*, the FCC relied on evidence that the CLEC had already had success attracting [redacted] of business customers and had "emerging success in the enterprise market" to support its conclusion that certain areas within the MSA were sufficiently competitive for UNE forbearance. The FCC also noted that the CLEC "possess[ed] . . . the necessary facilities to provide enterprise services," and had "sunk investments in network infrastructure." And yet, in the *Order* under review, the FCC found similar evidence submitted by Verizon *insufficient* to

the D.C. Circuit, Verizon's market share in each of the MSAs "appears to have been the dispositive and essential factor in the FCC's conclusion to deny Verizon's UNE forbearance petitions."[34] The D.C. Circuit remanded the *Verizon 6 MSA Forbearance Order* and directed the Commission to provide a reasoned explanation for its departure from precedent and indicated that "[t]he flaw is not in this change, but rather in the FCC's failure to explain it."[35]

III. DISCUSSION

Based on the D.C. Circuit's determinations, the Commission seeks input on its forbearance analysis regarding unbundling obligations. Specifically, the Commission is seeking commentary on its departure from its particular marketplace analysis in the *Omaha* and *Anchorage Orders* as well as additional factors that it should take into account when determining whether to grant unbundling obligation forbearance in the future.[36] Due to the potentially detrimental effects that grants of forbearance from unbundling obligations can have on both

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> support a finding of competitiveness in the six MSAs. A comparison of the FCC's analysis of the wholesale markets in the *Omaha* and *Anchorage Orders* and this *Order* reveals similar results. In both the *Omaha* and *Anchorage Orders*, the FCC found that the record did not "reflect any significant alternative sources of wholesale inputs for carriers" in either the Omaha or Anchorage MSAs. The lack of any significant alternative wholesale input sources in those two *Order*s did not prevent the FCC from concluding that forbearance was warranted. Nevertheless, in this *Order* the FCC relied on the very same finding–using the same language, in fact–to support its finding that the six MSAs were *not* competitive. The FCC cannot convincingly argue that these factors now prevent Verizon's petition for UNE forbearance when the same factors did not prevent forbearance in the *Omaha* and *Anchorage Orders*. The fact that these factors were applied similarly but yielded opposite results renders them meaningless in the analysis.

Id. at 15-16 (citations omitted).

[34] *Id*. at 15. In fact, in the Commission's order, former Commissioner Adelstein pointed out:

> There will always be imperfections in the data available to outside parties, but I would have preferred that the Commission take a finer look at specific geographic and product markets in this Order. In a welcome break from many recent Commission Orders, this Order does not place unwavering reliance on "predictive judgments" about our hopes for the development of competition but, instead, takes a closer look at the facts on the ground.

Verizon 6 MSA Forbearance Order, Concurring Statement of Commissioner Jonathan S. Adelstein.

[35] *Verizon v. FCC*, slip op. at 18 (citations omitted).

[36] Public Notice at 1-2.

consumers and the competitive marketplace, the Joint Commenters agree with the Commission that additional factors, or a more refined standard, need to be taken into account in such forbearance determinations going forward. In fact, the Commission took a step in the right direction when it issued the *Verizon 6 MSA Forbearance Order* by moving away from its "Coverage Threshold Test" (potential competition) and focusing, instead, solely on **actual competition** in the wireline voice marketplace. While the analysis was imperfect, the Commission's final determinations were proper—the Commission properly denied Verizon's requests for forbearance.

To that end, the Joint Commenters address certain facts and conditions at the time of the proceeding which warranted the Commission's departure from the precedent established in the *Omaha* and *Anchorage Orders*. Because of the confidentiality of much of the data filed in the instant proceeding, the Joint Commenters utilize for reference non-privileged data compiled and prepared by MDTC staff independent of this proceeding.[37]

A. By the time of the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order*, the Commission was cognizant of certain factors which warranted a greater focus on actual rather than potential market share in its analysis.

The timing between the Commission's UNE forbearance orders – the *Omaha Order* was issued in late 2005 and the *Anchorage Order* was issued in early 2007 – coincided with significant changes in the industry. Those two UNE forbearance orders followed shortly on the heels of the Commission's issuance of its *Triennial Review Remand Order* and the subsequent

[37] This data is specific to those regions of Massachusetts that are located within the Boston and Providence MSAs and is filed as Attachments 1 and 2 to these comments.

expiration of UNE-P pricing at TELRIC rates.[38] Further, several mergers led to increased concentration within the wireline market.[39] Finally, with the exception of the cable industry, competition for the residential wireline market was shrinking.[40] Arguably, these changes would have affected certain areas of the country more acutely than others, particularly between the Omaha and Anchorage MSAs versus the 6 MSAs in which Verizon sought forbearance. Therefore, a different forbearance standard would have been warranted.

In addition to marketplace changes, at the time of the *Verizon 6 MSA Forbearance Order*, the Commission was cognizant of the effect, in particular, of its *Omaha Order*. In the *Omaha Order*, the Commission indicated that it was making several "predictive judgment[s]" about Qwest's reaction to the order.[41] For instance, not only did the Commission predict Cox's potential competition through its estimated "coverage" at Qwest's wire centers (as summarized above), the Commission also specified that it did not anticipate Qwest would react to the

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[38] The Commission issued the *Triennial Review Remand Order* in February 2005, and the *Omaha Order* followed ten months later in December 2005. UNE-P pricing at TELRIC rates expired in March 2006, and the *Anchorage Order* followed ten months later in January 2007. *See Triennial Review Remand Order* at ¶ 227.

[39] *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, FCC 05-183, at ¶¶ 1-2 (rel. Nov. 17, 2005) (noting that "[t]his merger would combine one of the largest regional Bell Operating Companies … with one of the largest providers of interexchange and competitive local service"); *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184, at ¶¶ 1-2 (rel. Nov. 17, 2005) (noting again that "[t]his merger would combine one of the largest regional Bell Operating Companies … with one of the largest providers of interexchange and competitive local service"); *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189, at ¶¶ 1-2 (rel. Mar. 26, 2007) (noting that "[t]his merger would combine two regional Bell Operating Companies").

[40] In many states, LECs have reported reductions in percentages of their lines provided to residential customers. *Compare* Federal Communications Commission, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2008*, Tables 2 and 12 (rel. Jul. 2009) with *Local Competition: Status as of December 31, 2006*, Tables 2 and 12 (rel. Dec. 2007) and *Local Competition: Status as of June 30, 2005*, Tables 2 and 12 (rel. Apr. 2006). The Commission noted, however, that noted line reductions can be attributed to several factors. *Verizon 6 MSA Forbearance Order* at ¶ 39.

[41] *Omaha Order* at ¶¶ 79-83.

decision "by curtailing wholesale access to its analog, DS0-, DS1-, or DS3-capacity facilities."[42] Further, the Commission predicted "that Qwest's market incentives will prompt it to make its network available – at competitive rates and terms – for use in conjunction with competitors' own services and facilities," and it would "monitor the accuracy of this prediction in the wake of our decision; *in the event it proves too optimistic, we will take appropriate action*."[43] However, based on record evidence in the Verizon proceeding, the Commission's earlier predictions proved erroneous. According to PAETEC Communications, in the aftermath of the *Omaha Order*, certain competitors either left or decided not to enter the Omaha market.[44] Specifically:

> Faced with exorbitant price increases and the refusal of Qwest to negotiate a realistic commercial agreement, McLeod has announced its intention to withdraw from the Omaha market. It has begun scaling back its sales efforts in Omaha in anticipation of doing so. In addition, two other CLECs, Eschelon and Integra, have abandoned plans to enter the Omaha market because of Qwest's post-forbearance tactics.[45]

If the effect of the *Omaha Order* was indeed a *withdrawal* of competition within the Omaha MSA, then the Commission's use of predictive judgments in its analysis was clearly erroneous and warranted a second look in its later forbearance orders. Indeed, one form of "appropriate action" by the Commission would be to avoid predictive judgments about potential competition and ILEC action in future unbundling obligation forbearance orders, including the *Verizon 6 MSA Forbearance Order*. As former Commissioner Adelstein lauded:

> In a welcome break from many recent Commission Orders, this Order does not place unwavering reliance on "predictive judgments" about our hopes for the development of competition but, instead, takes a closer look at the facts on the

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42 *Id.* at ¶ 79.

43 *Id.* at ¶ 83 (emphasis added). Also according to the Commission, "[t]o the extent our predictive judgment proves incorrect, carriers can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling." *Id.* n.204, at 42.

44 PAETEC Communications Ex Parte, at 6 (filed Nov. 28, 2007) ("PAETEC Ex Parte").

45 *Id.* at 6 (citations omitted).

ground. In order to restore integrity to the forbearance process, the Commission simply must require petitioners to come forward with credible evidence regarding competitive conditions for the products and markets at issue.[46]

B. In those MSAs located in Massachusetts, granting forbearance to Verizon would have ensured a duopoly within the residential wireline voice market, effectively stifling further competition and creating barriers to entry.

It is well understood that a duopoly is a market structure with two directly competing firms.[47] While better than a monopoly, it is a less than desired market structure in which anticompetitive behavior can arise to the detriment of other prospective carriers and to the consumer.[48] For instance, carriers in a duopoly have the incentive to engage in collusive conduct to maximize their combined profits, and prevent the entry of new competitors.[49]

The Commission rightly considers duopolistic concerns in its proceedings.[50] In particular, the Commission has previously determined that the creation of a cable/ILEC duopoly was not the intent of the Act:

> We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be "impaired" within the meaning of section 251(d)(2). For example, although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to

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46 *Verizon 6 MSA Forbearance Order*, Concurring Statement of Commissioner Jonathan S. Adelstein.

47 *See e.g.* "Competition, Innovation and Deregulation," Speech by Joseph Farrell, FCC Chief Economist, at the Merrill Lynch "Telecommunications CEO Conference." New York, March 19, 1997 (rel. Apr. 1, 1997) ("Farrell Statements"), available at: http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1997/spfarrel.txt.

48 *Id.*

49 *See e.g.*, Arthur G. Frass & Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis.* The Journal of Industrial Economics, September 1977, at 42 (showing that the existence of a few firms in markets makes it easier for firms to coordinate their actions leading to stable collusive arrangements); *see also* James A. Brander and Barbara J. Spencer, *Tacit Collusion, Free Entry, and Welfare,* The Journal of Industrial Economics, March 1985, at 277 (concluding that firms in a duopoly have an incentive to engage in short term pricing structures that are designed to keep new firms from entering the market).

50 *See e.g.,* Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Office Market Corporation, Transferors, and EchoStar Communications Corporation, Transferee, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, at ¶ 103 (stating that "existing antitrust doctrine suggests that a merger to duopoly … faces a strong presumption of illegality.")

> requesting carriers. A standard that would be satisfied by the existence of a single competitive LEC using a non-incumbent LEC element to serve a specific market, without reference to whether competitive LECs are "impaired" under section 251(d)(2), would be inconsistent with the Act's goal of creating robust competition in telecommunications. In particular, such a standard would not create competition among multiple providers of local service that would drive down prices to competitive levels. Indeed, such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market. An absence of multiple providers serving various markets would significantly limit the benefits of competition that would otherwise flow to consumers.[51]

In both the *Omaha* and *Anchorage Orders*, the Commission rejected arguments that its decisions would result in duopolies in the respective ILEC's service territory.[52] Specifically, in the *Omaha Order*, the Commission stated:

> In the present context, we believe that the facilities-based competition between Qwest and Cox, in addition to the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under sections 251(c) and section 271 from which we do not forbear, minimized the risk of duopoly and of coordinated behavior or other anticompetitive conduct in this market.[53]

However, in their concurring statements to both orders, Commissioner Copps and former Commissioner Adelstein expressed reservation about the analysis used in the decision, and it is apparent that they considered the implication of a possible duopoly. They asserted:

> While we agree that there is especially strong evidence of competition between the incumbent cable and wireline providers in this market, we believe the statute contemplates more than just competition between a wireline and cable provider – and that both residential and business consumers deserve more.[54]

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[51] *In the Matter of Implementation of the Local Competition provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, at ¶ 55 (rel. Nov. 5, 1999).

[52] *Omaha Order* n.162 at 32; *Anchorage Order* at ¶ 46.

[53] *Omaha Order* at ¶ 71; *see also Anchorage Order* at ¶ 46 (rejecting duopolistic concerns for reasons similar to those presented in the *Omaha Order*).

[54] *Omaha Order*, Concurring Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein; *Anchorage Order*, Concurring Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein.

Because the Commission rejected Verizon's petitions on other grounds, duopolistic concerns were not discussed in the order. However, both Commissioner Copps and former Commissioner Adelstein observed the possible duopolistic implications arising from the Commission's analysis. According to Commissioner Copps:

> I support today's Order which denies petitioner forbearance relief from dominant carrier regulation and from its UNE and *Computer III* obligations. In doing so, the Commission further supports its view that *Qwest-Omaha* and *ACS-Anchorage* were truly unique situations. **I concur in this decision because the Commission continues to rely too heavily on the intermodal efforts of a single alternative provider to decide whether we should forbear from the incumbent's retail and wholesale obligations. The Telecom Act envisioned more than just a cable-telephone duopoly as sufficient competition in the marketplace.** In this case, the Order fortunately finds that forbearance is inappropriate because the petitioner does not face enough facilities-based competition from the local cable operator to meet Section 10's forbearance standard. However, I remain concerned that under the Commission's analysis, forbearance might be deemed appropriate were cable found to have a larger market share. Such a finding in the future would put at risk smaller competitive providers as evidenced by the fact that some competitors chose not to compete in Omaha after the *Qwest-Omaha* forbearance decision. **I would have been more comfortable with an analysis less accepting of duopoly as a competitive marketplace and that did not lead us further down this road.**[55]

And as observed by former Commissioner Adelstein:

> **[A]s I've stated before, I continue to believe that the Act contemplates a competitive environment based on more than a simple rivalry – or duopoly – of a wireline and cable provider.** Section 10 requires the Commission to consider, among other things, competitive conditions, the protection of consumers, and the public interest. The Commission must be ready to respond to a dynamic marketplace but it must also beware of the potential to lock consumers into a choice between two providers, a result that would have been more likely were relief granted here and one that would fall far short of the vital goals of the 1996 Act.[56]

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[55] *Verizon 6 MSA Forbearance Order*, Concurring Statement of Commissioner Michael J. Copps (emphasis added).

[56] *Verizon 6 MSA Forbearance Order*, Concurring Statement of Commissioner Jonathan S. Adelstein (emphasis added).

Based on competitive data for Massachusetts compiled by MDTC staff since the Commission's order, if the Commission had granted Verizon's petitions, then the Commission would have ensured a duopoly within the Massachusetts residential wireline voice market. For instance, as of December 2007, in those areas of the state that are located within the Boston and Providence MSAs, market shares for residential wireline voice subscribers, by platform, break down as follows:[57]

Boston Metro Region:

ILEC (i.e., Verizon) – 64.6%
Cable Voice – 31.6%
CLEC – 3.8%

Northeast Region:

ILEC – 69.3%
Cable Voice – 28.2%
CLEC – 2.6%

Southeast Region (excludes Cape Cod and the Islands):

ILEC – 70.9%
Cable Voice – 27.3%
CLEC – 1.7%

In most of the cities and towns located within these regions, as of December 2007, Comcast was the sole cable provider, and for all of those cities and towns, Verizon is the sole ILEC.[58] Based on this data, CLECs hold a minimal share of the residential market. In fact, when this data is coupled with the state data in the Commission's *Local Competition Reports*, the percentage of CLEC lines serving residential customers in Massachusetts was reduced by more than half

[57] *See* Figures BM-3, NE-3, and SE-3 at Attachment 1.

[58] *See* Figures BM-4 through BM-6, NE-4 through NE-6, and SE-4 through SE-6 at Attachment 1. It is worth noting that cable provider networks do not reach a percentage of the population in these regions. *Id.*

between June 2005 and June 2008.[59] For those CLECs that rely on Verizon's UNE loop and transport elements to provide residential services in Massachusetts, they would have likely exited the residential market if Verizon had been granted forbearance. And, as appeared to happen in the aftermath of the Omaha decision, because of substantially increased costs, other competitors would have been dissuaded from entering the market. This would have left Massachusetts consumers in the Boston and Providence MSAs with only two wireline voice options: Comcast or Verizon. As a result, the effect of granting Verizon forbearance (and the resulting creation of a duopoly in the residential wireline voice market) should be taken into consideration by the Commission when it responds to the D.C. Circuit's remands.

C. The wider geographic scope of the order and the specific data available warranted the more stringent forbearance standard of estimating Verizon's actual market share.

Unlike in the *Omaha* and *Anchorage Orders*, the Commission analyzed Verizon's requests for forbearance at the MSA level as opposed to the wire center level.[60] According to the Commission, it "lacked significant evidence of the type of last-mile facilities-based competition the Commission relied on" in the *Omaha* and *Anchorage* forbearance proceedings.[61] In the *Omaha Order*, the Commission explained that the "primary reason" that it used wire centers as

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[59] Compare: Federal Communications Commission, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2008*, Table 12 (rel. Jul. 2009) with *Local Telephone Competition: Status as of December 31, 2006*, Table 12 (rel. Dec. 2007), and *Local Telephone Competition: Status as of June 30, 2005*, Table 12 (rel. Apr. 2006). The Joint Commenters note that in most of those states in which both Qwest and Verizon seek forbearance, the CLECs' percentage of lines devoted to residential customers are similarly low (and declining) for the same time period, compared to the Nebraska percentages.

[60] *Verizon 6 MSA Forbearance Order* at ¶ 37; *Omaha Order* at ¶¶ 2, 6, and 69, n.186 at 36; *Anchorage Order* at ¶¶ 2, 9, and 14.

[61] *Verizon 6 MSA Forbearance Order* at ¶ 37. Indeed, the primary cable operators providing voice service in the Boston MSA tried to accommodate the Commission's wire center level and end user "coverage" area data requests, but pointed out that their systems were not based upon the wire center level and, accordingly, provided data based upon their own networks. *See* RCN Ex Parte, at 1-2, and Comcast Letter, at 1-2 (filed Nov. 9, 2007). In Massachusetts, cable service areas are based upon franchises, which are issued individually at the municipal level. *See* M.G.L. c. 166A, § 3.

opposed to some other measure was because both Qwest and Cox submitted data on a wire center level basis.[62] The Commission pointed out that it utilized a comparable wire center-based analysis in the *Triennial Review Remand Order* in order to determine which elements should be subject to unbundling.[63] Similarly, in the *Anchorage Order*, the Commission classified the wire center service area "as the relevant geographic market" for its analysis.[64] However, the reasons for delineating the wire center service area in the *Anchorage Order* as the appropriate geographic area differed from the *Omaha Order*—the Commission determined that the particular market characteristics (i.e., "substantial topographical and density variations" and non-uniform deployment of facilities by GCI) warranted a more granular focus.[65] While the Joint Commenters support a more granular analysis at the wire center level (or, preferably, at an even more granular level),[66] Verizon failed to provide data sufficient to permit the Commission to *perform* a more granular analysis at the wire center level. Therefore, the Commission's MSA-level analysis was warranted.

Because the Commission necessarily analyzed Verizon's requests at the MSA-level, the Commission's decision to apply a more stringent per se market share analysis to Verizon's market was appropriate. As the Commission indicated in the *Omaha Order*, the MSA is a "broad geographic region," and analyzing forbearance data on such a broad level does not allow

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62 *Omaha Order* at ¶ 6 and n.186 at 36.

63 *Id.*

64 *Anchorage Order* at ¶¶ 2, 9, and 14.

65 *Id.* at ¶¶ 15-16.

66 *Verizon 6 MSA Forbearance Order* at ¶¶ 38-42; *see also* MDTC Ex Parte at 2 (filed Dec. 4, 2007). Indeed, the Commission has previously indicated that "there are many possible ways to disaggregate geographic markets other than by wire center service areas, such as according to population thresholds, population density, distance from competitive fiber, MSAs, counties, zip codes, and many other possibilities." *Anchorage Order* at ¶ 19.

the Commission "to determine precisely where facilities-based competition exists."[67] This observation is especially true in markets as densely populated as the MSAs from which Verizon sought forbearance. As the Commission noted:

> [T]he 6 MSAs at issue in this proceeding include some of the most populous MSAs in the nation. Specifically, according to population, the New York MSA is ranked number 1; the Philadelphia MSA number 5; the Boston MSA number 11; the Pittsburgh MSA number 22; the Virginia Beach MSA number 34; and the Providence MSA number 35. In contrast, the Omaha and Anchorage petitions addressed competition in the 60th and 137th largest markets in the nation, respectively.[68]

In the Boston MSA alone, substantial population density variation exists.[69] For instance, based on the 2000 U.S. Census numbers, contrast the 31,388 *primary* housing units existing within the 4.13 square miles located in the City of Somerville, Massachusetts, with the 1,718 primary housing units located in the larger 4.53 square miles of the Town of Avon, Massachusetts.[70] If the Commission *had* granted forbearance at the MSA level, then based on the population characteristics in eastern Massachusetts, it is possible that certain municipalities would not have come close to meeting the coverage threshold utilized in the *Omaha* and *Anchorage Orders*. As a result, the Commission's exclusion of the Coverage Threshold Test from the *Verizon 6 MSA Forbearance Order* was proper.[71]

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67 *Omaha Order* n.186 at 36.

68 *Verizon 6 MSA Forbearance Order* n.69 at 12.

69 See Attachment 2, which lists the square miles and primary housing unit numbers by town.

70 *Id.*

71 In fact, it is the Joint Commenters' contention that the MSAs' variable population density alone sufficiently warranted departure from the Coverage Threshold Test to a more stringent forbearance standard.

D. Actual market share is a more reliable indicator than potential market share for whether a request for forbearance should be granted.

Within the purview of the *Verizon 6 MSA Forbearance Order*, the Commission's reliance on actual market share was prudent. Actual market share is a significantly more reliable indicator of whether a request for forbearance should be granted than is evidence about potential competition. For instance, the risk of relying on potential competition is that such competition may not materialize. Although it may seem that barriers to entry have been removed, competitors may not choose to enter markets because of limited capital, plans to enter markets elsewhere, or other reasons. In light of the recent economic downtown, this point is more pronounced, and reliance solely on actual market share as an indicator of whether forbearance should be granted becomes that much more appropriate. In addition, despite possible availability of a service, there is no guarantee that consumers will adopt that service.

Further, as the Commission has previously found, "the telecommunications industry is characterized by high fixed and sunk costs, network effects, and economies of scale, among other barriers to entry."[72] Although cable companies have already entered most markets, the presumption that a cable operator under the Coverage Threshold Test will be "willing and able within a commercially reasonable time of providing [phone] service to [**XX**] percent of the end user locations accessible from [an ILEC's] wire center" ignores the obvious point that, depending on a community's characteristics, build-out itself may require a higher cost for which

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[72] *Anchorage Order* at ¶ 31, citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 96-98, 98-147, 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, ¶¶ 85-91 (rel. Aug. 21, 2003) ("*Triennial Review Order*"), *corrected by Errata*, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied sub nom. National Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313, 316, 345 (2004).

the *cable* operator would not realize a profit on its service for a period of time, if ever.[73] Specifically, if a cable operater has not built out for video and broadband service, then it is not likely that they would do so to provide phone service. It is a dubious presumption to make, especially since no state law exists in Massachusetts to require incumbent cable operators to build out to every part of a franchise area in the first place.[74]

IV. CONCLUSION

Based on the foregoing, the Commission properly denied Verizon's requests for forbearance. In particular, sufficient facts exist for the Commission's departure from precedent and for the Commission to provide a "reasoned explanation" to the D.C. Circuit. Going forward, however, the Commission should revisit its dominant carrier regulation and unbundling obligation forbearance standards to ensure the protection of consumers and competition within the marketplace.

Respectfully submitted,

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[73] *Omaha Order* at ¶ 69.

[74] State law and regulations in the Commonwealth require cable operators to apply for franchises at the municipal level. *See* M.G.L. c. 166A, §§ 3-5; 207 C.M.R. §§ 3.02-3.04.